No. 751

MAR 12 1956

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

AMERE GAS UTILITIES COMPANY,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA
Appellee.

UPON APPEAL FROM THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

STATEMENT AS TO JURISDICTION

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INDEX
SUBJECT INDEX

	Page
Opinions Delivered Below	1
Grounds on Which Jurisdiction of This Court Is Invoked	2
Questions Presented	4
Statement of the Case	5
The Stage and Manner in Which Federal Questions Were Raised	17
The Federal Questions Are Substantial	19
Confiscation	[illegible]
Arbitrary Findings	22
Interstate Commerce Impaired	24
Conflict With Federal Regulation	24
Appendix "A"—Final Order of Supreme Court of Appeals of West Virginia	i
Appendix "B"—Final Order of Public Service Commission of West Virginia	iii
Appendix "C"—Order of Public Service Commission of West Virginia Granting Rehearing	vi
Appendix "D"—Order of Public Service Commission of West Virginia Dated February 25, 1955	ix
Appendix "E"—Report and Order of the Public Service Commission of West Virginia in Case No. 3888	xviii
Appendix "F"—Chapter 24, Article 5, Sec. 1 of The Official Code of West Virginia	xxxiv

TABLE OF CASES CITED

Page

Amere Gas Utilities Co. v. *Public Service Commission*, 347 U.S. 910, 74 S. Ct. 894, 98 L. ed. 1067 (1954) 10

The Atchison, Topeka and Santa Fe Railway Company v. *Public Utilities Commission of California*, 346 U.S. 346, 74 S. Ct. 92, 98 L. ed. 51 (1953) 3

Bluefield Water Works and Improvements Co. v. *Public Service Commission*, 262 U.S. 679, 43 S. Ct. 675, 67 L. ed. 1176 (1923) 21

Consolidated Edison Co. v. *National Labor Relations Bd.*, 305 U.S. 197, 59 S. Ct. 206, 83 L. ed. 126 (1938) 23

Ex Parte Williams, 277 U.S. 267, 48 S. Ct. 523, 72 L. ed. 877 (1928) 4

F. P. C. v. *Hope Natural Gas Company*, 320 U.S. 591, 610, 64 S. Ct. 281, 88 L. ed. 333 (1947) 27

Federal Radio Commission v. *Nelson Brothers B. & M. Co.*, 289 U.S. 266, 53 S. Ct. 627, 77 L. ed. 1166 (1933) 23

Florida v. *U. S.*, 282 U.S. 194, 210-211, 51 S. Ct. 119, 75 L. ed. 291 (1930) 24

Houston, East and West Texas Railroad Co. v. *U. S.*, 234 U.S. 342, 358, 34 S. Ct. 833, 58 L. ed. 1341 (1914) 24

Illinois Natural Gas Co. v. *Central Illinois Public Service Co.*, 314 U.S. 498 62 S. Ct. 384, 86 L. ed. 371 (1942) 28

Live Oak Water Users' Assoc. v. *Railroad Commission*, 269 U.S. 354, 46 S. Ct. 149, 70 L. ed. 305 (1926) 3

Page

N.L.R.B. v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 299, 59 S. Ct. 501, 83 L. ed. 660 (1939) 23

Natural Gas Pipeline Corporation of America v. *Corporation Commission of Oklahoma*, 349 U.S. 44, 75 S. Ct. 576, 99 L. ed. 866 (1955) 27, 28

Ohio Valley Water Co. v. *Ben Avon Borough*, 253 U.S. 287, 40 S. Ct. 527, 64 L. ed. 908 (1920) 21

Panhandle Eastern Pipeline Company v. *Public Service Commission of Indiana*, 332 U.S. 507, 516, 68 S. Ct. 190, 92 L. ed. 128, 137 (1947) 24

Phillips Petroleum Company v. *State of Wisconsin*, 347 U. S. 672, 74 S. Ct. 794, 98 L. ed. 1035 (1954) 25, 26

Public Utilities Commission of Ohio v. *United Fuel Gas Company*, 317 U.S. 456, 468, 63 S. Ct. 369, 87 L. ed. 396 (1943) 27

Railroad Commission of Wisconsin et al. v. *Chicago Burlington & Quincy Railroad Co.*, 257 U.S. 563, 585, 42 S. Ct. 232, 66 L. ed. 371 (1922) 24

Southern Pacific Co. v. *Arizona*, 325 U.S. 761, 779-780, 782, 65 S. Ct. 1515, 89 L. ed. 1915, 1930, 1931-1932 (1945) 28

St. Joseph Stockyards Co. v. *United States*, 298 U.S. 38, 56 S. Ct. 720, 80 L. ed. 1033 (1936) 21

State ex rel. Southwestern Bell Telephone Co. v. *Public Service Commission of Missouri*, 262 U.S. 276, 43 S. Ct. 544, 67 L. ed. 981 (1923) 15

STATUTES CITED

Page

Code of West Virginia of 1931, as amended:
Chapter 24, Article 5, Sec. 1 3

U. S. Code, Title 28, Sec. 1257 (62 Stat. 929) 2, 3

Natural Gas Act (15 U.S.C. 717-717W, 52 Stat. 821-833) 2, 4, 5, 8, 10, 12, 16, 19, 20, 24, 25, 26, 27, 28, 29

Constitution of the United States:
Article 1, Sec. 8, Cl. 3 ..... 2, 19, 24, 29
Fifth Amendment 2, 19
Fourteenth Amendment 2, 19, 21, 23

Federal Power Commission Rules of Practice and Procedure, Sec. 1.8; 12 F.R. 8471 25

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A Corporation,
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v.

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UPON APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

I

Opinions Delivered Below

The opinions and orders below are not reported.

The final order of the Supreme Court of Appeals of West Virginia entered December 9, 1955, denying Appellant's appeal from the final order of the Public Service Commission of West Virginia is attached as Appendix A. The final order of the Public Service Commission of West Virginia dated June 30, 1955, in this case (No.

4129) is attached as Appendix B; its order dated March 24, 1955, granting a rehearing is attached as Appendix C; and its order dated February 25, 1955 is attached as Appendix D. The report and order of the Public Service Commission of West Virginia dated August 31, 1953, in Case No. 3888, which was incorporated by reference into the Commission's orders dated February 25, 1955, and June 30, 1955, in this case, is attached hereto as Appendix E. (The record in Case No. 3888 was also incorporated into this record. (T. 134))

II

Grounds on Which Jurisdiction of This Court Is Invoked

This is an appeal by Amere Gas Utilities Company (hereinafter called Amere) under 28 U.S.C. § 1257(2), as amended (62 Stat. 929), from a final judgment of the Supreme Court of Appeals of West Virginia (hereinafter called the court below) entered on the 9th day of December, 1955 sustaining the validity of a statute of the State (final order of the Public Service Commission of West Virginia). The validity of such statute was challenged before the Court below on the grounds that it is repugnant to the Constitution of the United States, the Natural Gas Act, (52 Stat. 821-833; 15 U.S.C. §§ 717-717W), affirmative orders and rules of the Federal Power Commission (hereinafter called FPC) issued pursuant thereto.

The Public Service Commission of West Virginia (hereinafter called PSC) by an order dated February 25, 1955, prescribed permanent rates to be charged by Amere for natural gas service in the State of West Virginia. On March 24, 1955, pursuant to Amere's petition

filed March 7, 1955, the PSC reopened the proceeding to receive new evidence, and on June 30, 1955, it entered the final order confirming its order dated February 25, 1955.

Pursuant to Chapter 24, Article 5, Section 1 of the Official Code of West Virginia of 1931, as amended, (Michie's Section 2577)[1] Amere petitioned the court below on July 29, 1955 for a suspension and judicial review of the PSC's final order. The court below by final judgment made and entered on the 9th day of December, 1955, after reciting that it had maturely considered the record which was before the PSC, denied Amere's petition "for the reason that the final order of the Public Service Commission of West Virginia, dated June 30, 1955, is found to be plainly right." (Appendix A)

Consistent with its long standing practice (for more than 20 years) with respect to petitions to review rate cases, the court below did not write an opinion.

Amere's notice of appeal was filed in the Supreme Court of Appeals of West Virginia on February 9, 1956. Title 28 U.S.C. 1257(2) confers jurisdiction upon this Court to review upon appeal final judgments or decrees rendered by the highest court of a state, where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution or laws of the United States. Under repeated rulings of this Court, for jurisdictional purposes, the final order of the PSC must be treated as an act of the state legislature. *The Atchison, Topeka and Santa Fe Railway Company* v. *Public Utilities Commission of California*, 346 U. S. 346, 74 S. Ct. 92, 98 L. ed. 51, (1953); *Live Oak*

[1]Found in Appendix F hereof.

Water Users' Assoc. v. *Railroad Commission*, 269 U. S 354, 46 S. Ct. 149, 70 L. ed. 305, (1926); *Ex Parte Wil liams*, 277 U. S. 267, 48 S. Ct., 523, 72 L. ed. 877, (1928)

The statute of the State of West Virginia (the fina order of the PSC) is not yet reported, but is set forth in Appendix B, and orders incorporated therein by refer ence are set forth in Appendices C and D.

III

Questions Presented

1

Is the property of Amere confiscated within the mean ing of the Due Process Clause of the Fourteenth Amend ment by the PSC's refusal to allow Amere to recover the actual cost of gas purchased and paid for pursuant to a FPC tariff rate under the Natural Gas Act?

2

Does the order of the PSC violate the Due Process Clause by arbitrarily substituting fictional costs in lieu of the actual costs of purchased gas, without supporting evidence, and without making any study or determina tion of the cost of providing service?

3

Does the order of the PSC obstruct and burden inter state commerce by depriving Amere of a return on the greater part of its property, as a result of which Amere's ability to continue selling gas in interstate commerce for resale under the Natural Gas Act is impaired?

4

Does the order of the PSC unlawfully burden and ob struct interstate commerce by requiring the sale (neces

sitating the abandonment of existing sales) and transportation of natural gas in interstate commerce on terms and conditions and at prices fixed by the PSC contrary to rates and orders of the FPC under the Natural Gas Act?

IV

Statement of the Case

Amere Gas Utilities Company, a subsidiary of The Columbia Gas System, Inc., is a West Virginia corporation engaged in the business of distributing natural gas to customers in three separate areas in West Virginia. Amere does not produce any gas (T. 225) nor does it have pipe lines interconnecting the three separate areas served. (See map, Exhibit 17)

Amere initiated gas service in its Beckley-Mullens area in October, 1929, at which time its entire supply of gas was purchased from local producers in that area. In 1931 Atlantic Seaboard Corporation (hereinafter referred to as Atlantic) constructed its 20-inch pipe line from Boldman, Kentucky to eastern markets. This pipe line made gas available for the first time for distribution in Amere's Lewisburg-Ronceverte-White Sulphur Springs area and its Princeton-Athens area, and Amere initiated gas service in those areas in 1931 and 1932 with gas obtained from Atlantic. There is still no other source of supply available to these areas except one isolated well with insignificant production. Amere sells gas acquired from local producers in its Beckley-Mullens area to George W. Willis for resale locally, and since 1951, it has sold gas in interstate commerce (through facilities in its Princeton-Athens area) to Bluefield Gas Company for resale, subject to the jurisdiction of the Federal Power Commission. (Case No. 3888, Exhibit 1, pp. 5-6)

The requirements of Amere's markets have greatly increased in recent years and there is no longer sufficient gas produced in its Beckley-Mullens area to meet the requirements of its customers in that area duri. g the heating season. There is, however, a surplus of locally produced gas in that area during summer months. The winter requirements of Amere's customers are several times as great as their summer requirements. For example, on an average day in August, Amere sold 2,046 Mcf of gas at retail, but on January 29, 1952 it sold 22,187 Mcf of gas or eleven times the average daily sales for August and three times the average daily sales for the entire year. (Exhibit No. 1, p. 8, Case No. 3888) Amere's Beckley-Mullens area, which has a surplus of gas from local production during summer months, required gas from Atlantic on 170 days in 1952. (Case No. 3888, T. 31) Gas is, therefore, a surplus commodity during summer months and at a premium during winter months.

Atlantic has the same problem, (T. 461-462) and this is generally the situation throughout the gas industry. (T. 458-459) Winter gas, being at a premium, is more expensive than gas which is available in abundance during summer months. (T. 314) Consequently, large independent producers sometimes shut-in their non-competitive wells during summer months so they can sell the gas at a higher price during winter months. (T. 401) Pipe line companies sell natural gas under a two-part, demand and commodity rate under which the average cost per Mcf increases as the variation between summer and winter sales increases. (T. 314, 280) Atlantic purchases most of its gas supply under a two-part rate of this type. (T. 280)

In 1948 Columbian Carbon Company, a non-affiliated independent producer, developed some gas production in Raleigh County, West Virginia near Amere's Beckley-Mullens area and Amere attempted to purchase such gas. (T. 395) Columbian Carbon Company, however, for reasons of its own, refused to enter into a contract with Amere as the sole purchaser. A representative of Columbian Carbon Company testified that his company wanted to be assured of a broader market than Amere's, (T. 177, Case No. 3888) and the vice president of that company testified that he was directed not to sell the gas to Amere but to sell only to a major gas company. (T. 397, Exhibit 19)

Amere and Atlantic, therefore, entered into a contract with Columbian Carbon Company for the joint purchase of the latter's Raleigh County production, and (Exhibit No. 9, Case No. 3888) Amere and Atlantic entered into a separate contract which is on file with the FPC as Rate Schedules of both Atlantic and Amere. (T. 297-300, 302, Case No. 3888 T. 34) These FPC Rate Schedules provide that (a) Amere purchases the Columbian Carbon gas on any day that such gas can be utilized in Amere's Beckley-Mullens area; (b) on any day that such gas can not be so utilized it is purchased by Atlantic and delivered to Atlantic by Amere; (c) As consideration for Amere delivering the Columbian Carbon Company gas to Atlantic on the days that Amere can not utilize such gas, Atlantic accepts from Amere all gas which the latter purchases from other producers in the Beckley-Mullens area in excess of its current requirements in that area and delivers to Amere equal volumes of gas in its other operating areas as needed. (Case No. 3888, Exhibit 1, Appendix I)

The Issues

The only issues in this case relate to the PSC's refusal to permit Amere to recover, through its rates, costs of $184,000 per year[2] admittedly incurred in the purchase of natural gas from Atlantic, an interstate pipe-line company, at rates subject to the exclusive jurisdiction of the FPC under Sections 4 and 5 of the Natural Gas Act (52 Stat. 822-823, 1938, 15 U.S.C. 717c and 717d).

The PSC rationalizes its disallowance of Amere's admittedly actual cost of gas purchased at FPC rates by finding that four gas companies[3] which are subject to FPC jurisdiction, should abandon certain interstate service, including Atlantic's interstate sales to Amere. In lieu thereof, the PSC found that certain specific service should be initiated, including interstate transportation of gas to Amere by Atlantic, which is not authorized to transport gas for others.

Thus, sharp conflicts between State and Federal law were created, the West Virginia Commission attempting, in effect, to override and nullify Federal regulation of interstate commerce.

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[2]As will be more fully discussed below, this is the equivalent of depriving the Company of a return on 85% of its investment.

[3]These four companies, which were not parties to the proceeding, are:

(1) Atlantic Seaboard Corporation, a subsidiary of The Columbia Gas System, Inc. (T. 322-323),

(2) United Fuel Gas Company, a subsidiary of The Columbia Gas System, Inc.,

(3) Columbian Carbon Company, a non-affiliated independent producer, and

(4) Godfrey L. Cabot, a non-affiliated independent producer.

Atlantic's First FPC Rate Case

In FPC Docket No. G-1384, witnesses for the PSC testified that Atlantic's proposed rates to Amere were too high (T. 312, Case No. 3888, T. 254, 364-365), but the FPC found that such rates were discriminatory in favor of Amere, and that Amere should pay more. (Case No. 3888, T. 39)

Amere's PSC Rate Case No. 3888

Thereafter, on January 6, 1953, Amere filed increased rates with the PSC, and hearings with respect thereto were held in Case No. 3888. The PSC staff witness contended in that case that Atlantic's FPC rates to Amere were excessive and Amere should not be permitted to recover the cost of gas purchased thereunder. He criticized the FPC's rate-making policies at great length, (Case No. 3888, T. 369-374) and stated among other things, "I wanted to mention this case because it shows that under the Natural Gas Act all the costs and considerations are not given weight in rate-making." (Case No. 3888, T. 371) He concluded that "it shows me in regard to this case that Federal Power is interested in gas over in the east and not in West Virginia—the price of the gas over east.", and "The Natural Gas Act was mentioned as controlling in the Amere case and I wanted to show the Commission how the Federal Power handles the regulation under the Natural Gas Act, and [therefore] should we be bound by the action of Federal Power." (Case No. 3888, T. 372)

Counsel for Amere moved to strike all of the evidence given by the Commission's staff witness which eliminated from operating expenses the cost of gas purchased at

FPC rates. Counsel stated, "We are not responsible for the Natural Gas Act nor the Federal Power Commission nor its results but we are subject thereto. And under the Natural Gas Act the Federal Power Commission has the sole and exclusive jurisdiction over the rate charged by Atlantic Seaboard Corporation to the Amere Gas Utilities Company." (Case No. 3888, T. 376) The motion was denied, and in its final order (Appendix E) the PSC concluded that the gas sold to Amere by Atlantic at FPC rates was overpriced and disallowed all costs in excess of a price which it arbitrarily determined.

The PSC further found that the gas purchased by Atlantic from Columbian Carbon Company *during summer months* should be purchased by Amere, and in determining Amere's cost of service substituted the price paid therefor by Atlantic for the cost of equal volumes of gas actually purchased by Amere from Atlantic *during winter months.*

Amere appealed Case No. 3888 to the Court below. The appeal was denied, and a further appeal to this Court was dismissed for lack of a substantial federal question. *Amere Gas Utilities Company* v. *Public Service Commission*, 347 U. S. 910, 74 S. Ct. 894, 98 L. ed. 1067 (1954).

Atlantic's Subsequent FPC Rate Case

At the time Amere's appeal to this Court was dismissed, a proceeding involving Atlantic's rates was pending before the FPC in Docket No. G-2054. That proceeding was terminated by a stipulated agreement, after conferences among the staff of the FPC, Atlantic's customers and a representative of the PSC of West Virginia. At the settlement conferences, representatives of Amere,

Atlantic and the PSC urged that Atlantic's rates to Amere be established on the basis of the PSC's order. (T. 320, Mr. Ryder's affidavit, PSC's Statement of Reasons pp. 23-24) The FPC acquiesced in the PSC rate for gas sold by Atlantic to Amere, but rejected the PSC's finding that the Columbian Carbon Company gas purchased by Atlantic should be purchased by Amere. It treated such purchases in accordance with Atlantic's FPC Rate Schedule X-10 and Amere's FPC Rate Schedule X-1. (T. 303, 320. PSC's Statement of Its Reasons, pp. 23-24)

After the proceeding in FPC Docket No. G-2054 was concluded, Amere was still paying more for the gas purchased than it was recovering through its rates, even though the issues relating to such costs had been presented to both the PSC and the FPC. It was, therefore, necessary for Amere to institute the instant proceeding in an attempt to recoup this substantial cost as well as increased costs incurred subsequent to the PSC's final order in Case No. 3888.

The Instant Case

The rates in the instant proceeding were designed to recover the loss resulting from different treatment of the Columbian Carbon Company gas by the two commissions and the increase from forty cents (40c) to fifty cents (50c) per Mcf in price of gas purchased from Atlantic, which increase became effective November 1, 1954.[4]

In its filing in this proceeding, on August 9, 1954, Amere requested the PSC to join with the FPC in a con-

[4]Subsequent to Amere's Case No. 3888 and the settlement of Atlantic's FPC rate case in Docket No. G-2054, *supra*, Atlantic's rates were increased to all customers except Amere, effective February 1, 1954 (Docket No. G-2275) and to all customers, including Amere, effective November 1, 1954 (Docket No. G-2452). (T. 31)

current hearing with respect to this case and increased interstate rates which Amere filed with the FPC on July 20, 1954, "for the purpose of developing a joint record."[5] Amere's Vice President testified that concurrent hearings were requested of both commissions in the hope that "the full problems of Amere could be considered by the two commissions and an equitable solution found." (T. 305-306) The PSC proceeded with hearings and decided this case and the FPC has not yet heard the case before it. (T. 387)

The PSC's final order is incomplete upon its face, and it is necessary to go to the record to determine how its conclusions were reached.

The PSC stated in its order (Appendix D), that it had set out the formula or plan it used in arriving at its conclusions in its report and order in Case No. 3888 (Appendix E), and that it would not restate those conclusions in the instant case except to say that its Staff's Exhibit in the instant case and its conclusions had followed such formula or plan.

In its Statement of Reasons for Entry of Its Final Order, which is required by statute, (Appendix F) the PSC stated:

> *"Amere's position in both this case and Case No. 3888 is and has been that the price which it shall pay to Atlantic for gas must be governed by rates which the Federal Power Commission fixes from time to time for sales of gas made in interstate com-*

[5]Section 17 of the Natural Gas Act (52 Stat. 830 (1938); 15 U.S.C. 717p) authorizes the Federal Power Commission to confer with any State Commission "regarding rate structures, *costs*, and charges, *practices*, classifications, and * * * to hold joint hearings with any State Commission." (Emphasis added)

merce by Atlantic. The persistence of Amere in treating as the cost of gas to be the price it pays to Atlantic pursuant to a tariff filed by Atlantic with the Federal Power Commission is the plan or design to which the Commission objects and which it has rejected." (p. 16) (Emphasis supplied)

The Commission's report and order in Case No. 3888 (Appendix E) is ambiguous but its formula and conclusions were explained in detail on the record in this proceeding by the PSC's witness (T. 243 *et seq.*, 247, 259, 260, 277, 278) and the presiding Commissioner, (T. 261) and the PSC order (Appendix D) sanctions the staff witness' explanation. Also, at page 2 of its final order (Appendix B), the PSC relied upon the testimony of its staff accountant with respect to the availability of gas to meet Amere's requirements in conformity with the PSC plan in Case No. 3888.

The PSC staff accountant testified that the following should be done to make a sufficient quantity of gas available to Amere in accordance with the PSC's plan.

1. Amere should cease purchasing natural gas from Atlantic, (T. 233, 238) its supplier since 1931. (Case No. 3888, Exhibit 1, p. 4)

2. Columbian Carbon Company, a non-affiliated, independent producer, should discontinue its sales of gas in interstate commerce to Atlantic for resale and should sell such gas to Amere. (T. 186)

3. Atlantic should continue receiving the gas it now purchases from Columbian Carbon Company during warm weather when such gas cannot be used by Amere, but Amere should purchase the gas, and Atlantic should deliver equal volumes of gas to Amere as and when needed during cold weather. (T. 186)

4. Godfrey L. Cabot, Inc., a non-affiliated, independent producer of natural gas, should abandon its sales of natural gas in interstate commerce to Atlantic for resale, and should sell such gas to United Fuel Gas Company (hereinafter referred to as United), for resale to Amere. (T. 247-248)

5. United should abandon its sales in interstate commerce of natural gas produced and purchased in West Virginia to Atlantic for resale, (under FPC certificates and rates) and should sell such gas to Amere. (T. 243, *et seq.*)

6. Atlantic, (which is engaged solely in the transportation and sale of its own gas in interstate commerce for resale, admittedly subject to the exclusive jurisdiction of the FPC under the Natural Gas Act, (T. 287, 295, 481)) should become a carrier and receive gas which it now purchases from United and Godfrey L. Cabot, Inc., and deliver such gas to Amere. (T. 243, *et seq.*)

7. United should charge Amere forty cents (40c) per Mcf for the gas which it would sell to Amere (T. 260) and United should defray Atlantic's *undetermined* costs of (a) transporting the gas to be sold by United to Amere, (b) transporting gas (never owned by United) from Amere's Beckley-Mullens area to its other operating areas (T. 270-278),* and (c) receiving Columbian Carbon Company gas (never owned by United) from Amere *in the summer* and delivering equal volumes of gas to Amere *in the winter*. (T. 277-278)

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*In consideration for Amere transporting the Columbian Carbon Company gas purchased by Atlantic, Atlantic receives gas which Amere purchases from other local producers in excess of its current requirements in its Beckley-Mullens area and delivers equal volumes to Amere in its other two operating areas, pursuant to Atlantic's FPC Rate Schedule X-10 and Amere's FPC Rate Schedule X-1.

The foregoing plan is without supporting evidence and, in fact, is counter to the operating facts as well as Federal regulation.

Unquestionably, gas service would never have been available in two of Amere's three operating areas without gas from Atlantic's pipe line, and there is no way to meet the present requirements of any of Amere's operating areas without gas from Atlantic's pipe line. Nevertheless, after more than twenty years of service by Atlantic to Amere, the PSC has decided that Atlantic should abandon such interstate sales. The PSC found, however, that Atlantic should continue delivering gas to Amere, but on a complicated exchange and transportation basis which is contrary to FPC regulation.[7]

Admittedly, Amere purchases all of the Columbian Carbon Company gas that it can utilize at the time and when Amere cannot utilize such gas, it is purchased by Atlantic and resold by Atlantic in interstate commerce for resale. Columbian Carbon Company's vice president testified that his company would not sell the gas to Amere alone. (T. 395. *et seq.*, Exhibit 29) Columbian Carbon Company was willing to contract for the sale of this gas only if the contract was signed by a major company having a broad market which could utilize the gas at all times.

If Amere purchased the gas from Columbian Carbon Company in excess of its current requirements and trans-

[7]The PSC not only interfered with FPC jurisdiction under the Natural Gas Act, but also ignored the mandate of this court in *State ex rel. Southwestern Bell Telephone Co.* v. *Public Service Commission of Missouri*, 262 U.S. 276, 43 S. Ct. 544, 67 L. ed. 981 (1923), stating that "It must never be forgotten that, while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership."

ported and delivered it to Atlantic, such transportation and delivery would be in interstate commerce for resale. Atlantic has no markets in West Virginia which could utilize the gas and there is no place where it could be stored for subsequent delivery to Amere. The gas which Amere would physically receive in return would consist primarily of gas purchased by Atlantic in Kentucky.

The transactions affecting the Columbian Carbon Company gas are subject to FPC Rate Schedules of both Amere and Atlantic. (T. 309-310, Case No. 3888, Exhibit 1, Appendix I, T. 106) In its statement of reasons for the entry of its final order the PSC recognized (pp. 23-24) that subsequent to Case No. 3888 both Amere and Atlantic requested the FPC to permit them to conform to the PSC's plan regarding the Columbian Carbon Company gas and that the FPC refused. The PSC concluded that the FPC's action resulted in discrimination against Amere's intrastate customers.

Godfrey L. Cabot, Inc. which was not a party to the proceeding has contracted to sell gas to Atlantic for resale in interstate commerce. Such sale is subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act. Under the PSC plan such gas should be sold to United for resale to Amere. It is conceded that neither Amere nor United have any facilities to receive such gas from Godfrey L. Cabot, Inc. and under the PSC's plan, the gas would be delivered to Atlantic, but would be sold to United for resale to Amere.

All of the gas which United sells to Atlantic and delivers into Atlantic's 20-inch pipe line, whether produced in Kentucky or West Virginia, is sold in interstate commerce for resale and is billed to Atlantic under the same FPC Rate Schedule. (T. 317-318)

It is agreed that 78 per cent of all gas in Atlantic's 20-inch pipe line, which serves Amere, is produced in Kentucky. (Stipulation dated May 3, 1955) There is no way to separate the West Virginia gas in such pipe line from the Kentucky gas. (T. 481) Even if Atlantic was a common carrier and could legally receive gas from United for the account of Amere and deliver equal volumes of gas to Amere, such transaction would be an exchange of interstate gas for West Virginia gas and subject to FPC jurisdiction.

Even if the PSC plan were otherwise practicable, the gas which it found should be made available to Amere is inadequate to meet Amere's requirements during winter months. The PSC staff witness, the PSC's consultant, and an officer of Amere, agreed that all of the gas produced in West Virginia, which under the PSC plan should be made available to Amere, is not equal to Amere's requirements during certain winter months. (T. 522, 536-537, 477) It, therefore, would be necessary under the PSC's plan for Atlantic to deliver gas purchased in Kentucky *during the winter* to Amere in exchange for gas received from United, and Godfrey L. Cabot, Inc. *in the summer.*

The Stage and Manner in Which Federal Questions Were Raised

All questions here presented were raised on the record before the PSC, which record was considered by the Court below. (T. 21, 26-27, 28, 29, *et seq.*, 110, 116, 117, 118, 137, 138, 140-141, 233, 253, 259, 260, 261, 267, 269, 277, 278, 279-280, 282, 284, 286, 287, 295, 296, 297, 300, 302, 303, 305, 309-311, 314, 316, 320, 322, 325, 381 *et seq.*)

In answer to an objection to questions asked of the Commission's Staff witness on cross-examination, Counsel for Amere stated (T. 218-219):

> "I would like to direct Mr. Tissue's attention to the Constitution of the United States, which prevents confiscation.
>
> * * * * *
>
> "I am merely attempting to bring out by this witness that subsequent to that, [Case No. 3888] the Federal Power Commission has not given us the costs that this Commission denied, and that we came back here to request those costs, and that we are caught in the middle." (See also T. 211-212)

In its petition for review of the final order of the Public Service Commission filed in the court below, Amere assigned the following errors:

> "The Commission exceeded its jurisdiction by attempting to regulate matters within the exclusive jurisdiction of the Federal Power Commission.
>
> "The order interferes with the flow of gas in interstate commerce and is in violation of the commerce clause of the Federal Constitution and the Natural Gas Act.
>
> "Petitioner was denied due process of law both procedurally and substantively, contrary to the Constitutions of the United States and the State of West Virginia.
>
> "By refusal to allow petitioner its actual operating expenses for gas purchased pursuant to a Federal Power Commission tariff, Amere has had its property confiscated without due process of law, and without just compensation, in violation of both State and Federal Constitutional Provisions."

V

The Federal Questions Are Substantial

This case presents several important federal questions arising under the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the Constitution, and the Natural Gas Act. The PSC order is contrary to the following fundamental principles of federal law. This Court has repeatedly held:

(1) Utilities are entitled to recover their operating expenses and earn a fair return on their property devoted to the public interest,

(2) Findings of fact must be supported by substantial evidence,

(3) Intrastate commerce cannot be regulated in such a manner that interstate commerce will be burdened or obstructed thereby, and

(4) The jurisdiction of the FPC under the Natural Gas Act is exclusive and invalidates conflicting state regulation.

1

Confiscation. When rates are based on the minimal rate base (original cost less depreciation) as in this case (Appendix D), that part of the rate base on which no return will ever be earned is confiscated. The PSC's order fixed rates which will not permit Amere to recover $184,000 *per year* of its cost of gas purchased and paid for at FPC rates—the only rates under which it could obtain the gas to serve its customers. The magnitude of the resulting confiscation is demonstrated by the fact that the Commission found Amere's average net original cost rate base (applicable to both interstate and intrastate service) to be $3,413,151[8] on which it found Amere

should receive a return of 6¼ per cent, or $213,322. (Appendix D) The $184,000 which was disallowed is only approximately $29,000 per year less than the total return which the PSC found Amere was entitled to receive. Since Amere cannot avoid paying the FPC rates for the gas it purchases, the effect of the disallowance of $184,000 of such cost is to deprive Amere of more than 85 per cent of its return and thereby confiscate 85 per cent of its rate base.

The PSC's orders in two successive rate cases indicated that it will never permit Amere to recover this expense unless (a) four natural gas companies, subject to FPC jurisdiction under the Natural Gas Act, conform their operations to the PSC's plan in violation of the Natural Gas Act, or (b) this court holds that the PSC's action is unlawful. The PSC pointed out in its statement of its reasons for the entry of its final order herein that the FPC would not permit the PSC's plan to be followed. (pp. 1, 23 *et seq.*) Amere, therefore, can never earn a return on 86 per cent of its total interstate and intrastate rate base if the PSC's order is permitted to stand unreversed.

This utility and the total investment in its plant will not only be completely wiped out if the PSC's order is not reversed, but without earnings, it obviously cannot continue serving either its interstate or intrastate customers.

This Court has repeatedly held that rate making orders though legislative in nature must be reviewed by the

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[6]In its cost of service, the PSC Staff showed revenues for the transportation of gas in interstate commerce to Bluefield Gas Company as Other Gas Revenues (Staff Exhibit No. 1, Schedule 1, p. 1, line 12) and therefore, showed the total rate base and a return thereon in determining the revenue deficiency. (PSC Staff Exhibit 1, Schedule 15, p. 1, line 9 and line 15)

courts as to both law and facts under the due process clause of the Fourteenth Amendment to the Constitution of the United States. *Bluefield Water Works and Improvement Co.* v. *Public Service Commission*, 262 U. S. 679, 43 S. Ct. 675, 67 L. ed. 1176 (1923); *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 40 S. Ct. 527, 64 L. ed. 908 (1920). The reasoning underlying this doctrine was stated in *St. Joseph Stockyards Co.* v. *United States*, 298 U. S. 38, 56 S. Ct. 720, 80 L. ed. 1033 (1936),* which held that the Constitution fixes limits to the rate making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation; that legislative declarations or findings with respect to rates are necessarily subject to independent judicial review on the facts and the law "to the end that the Constitution as the supreme law of the land may be maintained."

The Court stated:

> "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards.

*This case states limits to the rate making power under the due process clause of the Fifth Amendment, however, this Court stated in *Federal Power Commission* v. *Natural Gas Pipe Line Company of America*, *supra*, that the power to regulate rates under the Fifth Amendment is at least as great as that of the states under the Fourteenth.

> * * * The principle applies when rights either of person or of property are protected by constitutional restrictions." (p. 52)

2

Arbitrary Findings. Even if the PSC's action was not otherwise unlawful, its findings as to the price which Amere should pay for gas are unsupported by evidence. The staff witness, on whose exhibit and testimony the PSC based its determination of the cost to be allowed for gas purchased, stated that he assumed Amere's requirements in excess of the locally produced gas would be purchased from United (T. 259), and transported to Amere by Atlantic. (T. 260) He assumed that United would receive forty cents (40¢) per Mcf for such gas, (T. 241) and that it would pay Atlantic for (a) transporting the gas sold by United to Amere, (b) transporting gas (never owned by United) from Amere's Beckley-Mullens area to its other operating areas, (T. 270-278) and (c) receiving Columbian Carbon Company gas (never owned by United) from Amere *in the summer* and delivering equal volumes of gas to Amere *in the winter*. (T. 277-278) The witness admitted that he had made no study of Atlantic's cost of performing any of such transportation and exchange services. (T. 269, 279 and 280) The witness also admitted that the average cost per Mcf of the gas purchased by Atlantic for its other customers (at FPC rates) would be increased if Atlantic received gas for the account of Amere *in the summer* and purchased equal volumes of gas *in the winter* for delivery to Amere. (T. 280) He did not, however, make any study to determine the effect of the assumed transactions between United, Atlantic and Amere upon Atlantic's cost of serving its other customers. (T. 282)

The record is wholly devoid of any evidence with respect to the costs Atlantic would incur under the PSC's plan. (T. 269, 279 and 280) There is no evidence with respect to United's overhead costs related to the gas which the PSC found should be purchased by United and sold to Amere, although the PSC's staff witness admitted that United's books contain an account which reflects costs of this nature. (T. 267) There is, therefore, no support in the record for the PSC's conclusion that forty cents (40¢) per Mcf applied to the volumes of gas which it said Amere should purchase from United would be adequate (a) to pay for such gas, and (b) to enable United to pay Atlantic for the assumed transportation and exchange services.

This Court has repeatedly held that findings of fact must be supported by substantial evidence. "A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law." *Federal Radio Commission* v. *Nelson Brothers B. & M. Co.*, 289 U. S. 266, 53 S. Ct. 627, 77 L. ed. 1166 (1933). "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established." *N.L.R.B.* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299, 59 S. Ct. 501, 83 L. ed. 660 (1939). "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *National Labor Relations Bd.*, 305 U. S. 197, 59 S. Ct. 206, 83 L. ed. 126 (1938).

The cost which the PSC allowed in lieu of the actual cost of gas purchased by Amere is clearly arbitrary, being wholly unsupported by evidence, and Amere is deprived of due process of law.

3

Interstate Commerce Impaired. The intrastate rates prescribed by the PSC will impair Amere's ability to render service in interstate commerce under the Natural Gas Act. As heretofore pointed out, the confiscation under the PSC's order is of such magnitude that Amere's very existence is in peril. The PSC's order, therefore, not only confiscates Amere's property but also burdens and obstructs interstate commerce by impairing Amere's ability to continue its interstate service. This Court has frequently held that non-compensatory intrastate rates obstruct and burden interstate commerce when the utility's ability to render adequate interstate service is injuriously affected. *Houston, East and West Texas Railroad Co.* v. *U. S.*, 234 U. S. 342, 358, 34 S. Ct. 833, 58 L. ed. 1341 (1914); *Railroad Commission of Wisconsin* et al. v. *Chicago, Burlington & Quincy Railroad Co.*, 257 U. S. 563, 585, 42 S. Ct. 232, 66 L. ed. 371 (1922); *Florida* v. *U. S.*, 282 U. S. 194, 210-211, 51 S. Ct. 119, 75 L. ed. 291 (1930).

4

Conflict with Federal Regulation. Pursuant to the Commerce Clause, Congress delegated authority to the FPC to regulate the transportation of natural gas in interstate commerce, the sale of natural gas in interstate commerce for resale, and natural gas companies engaged in such transportation or sale. (N.G.A. § 1(b), 52 Stat. 821 (1938); 15 U.S.C. § 717) *Panhandle Eastern Pipeline Company* v. *Public Service Commission of Indiana*, 332 U. S. 507, 516, 68 S. Ct. 190, 92 L. ed. 128, 137 (1947). The Act provides that all rates and charges and all rules and regulations pertaining to such rates shall be filed

with the FPC and no changes shall be made except in the manner prescribed therein. It specifically provides for complaints to the FPC by any state commission with respect to any effective or proposed rate on file with the FPC. (§ § 4 and 5) The Act and the FPC Rules of Practice and Procedure permit state commissions to participate in hearings before the FPC and if aggrieved by the FPC's final order, the commission may appeal. § § 15(a), 19 N.G.A., 12 F.R. 8471, § 1.8. Cf. *Phillips Petroleum Company* v. *State of Wisconsin*, 347 U. S. 672, 74 S. Ct. 794, 98 L. ed. 1035 (1954)

The PSC did not appeal the FPC's final order in Docket No. G-1384, when the FPC failed to adopt the PSC's recommendation with respect to Atlantic's rates to Amere, nor in Docket No. G-2054 when the FPC rejected the PSC's treatment of the Columbian Carbon Company gas. Instead it has attempted to nullify FPC action insofar as such rates are concerned. In two consecutive cases, the PSC has disallowed the actual expenses incurred for gas purchased by Amere. In the instant case it has fixed Amere's rates on alleged costs, arbitrarily assumed, based on the PSC's assumption of power (a) to require abandonments of interstate service by Columbian Carbon Company, Godfrey L. Cabot, Inc., United, and Atlantic, (b) to require the transportation in interstate commerce by Atlantic of gas owned by others, (c) to require the delivery by Atlantic of Kentucky gas to Amere in the winter in exchange for West Virginia gas in the summer, and (d) to fix rates for the transportation and sale of natural gas in interstate commerce.

Under the Natural Gas Act the jurisdiction of the Federal Power Commission under Sections 4 and 5, the rate

sections, Section 7(c), the certificate section, and Section 7(b), which prohibits the abandonment of any sale in interstate commerce, extends not only to Atlantic, which is admittedly subject to the exclusive jurisdiction of the Federal Power Commission, but also to Columbian Carbon Company, and Godfrey L. Cabot, Inc., independent producers which sell natural gas produced in West Virginia to Atlantic for resale in interstate commerce, *Phillips Petroleum Company* v. *State of Wisconsin, supra,* and to United, which sells natural gas produced and purchased in West Virginia to Atlantic (at FPC rates) for resale in interstate commerce.

Even if the PSC could require the abandonments of interstate sales for resale of natural gas produced in West Virginia by Columbian Carbon Company, Godfrey L. Cabot, Inc., and United without regard to the Commerce Clause and Section 7(b) of the Natural Gas Act, it is agreed that 78 per cent of all gas delivered to Amere from Atlantic's facilities would still be transported by Atlantic in interstate commerce from Kentucky (Stipulation dated May 3, 1955). There is no way the West Virginia gas could be separated from the Kentucky gas for delivery to Amere. (T. 481) And even if the West Virginia gas in Atlantic's pipe line could be separated from the much larger quantities of Kentucky gas, there would not be adequate quantities of West Virginia gas available to Atlantic to meet Amere's requirements during winter months. (T. 477) The PSC based its action on a finding only that United, Godfrey L. Cabot, Inc., and Columbian Carbon Company sell enough West Virginia gas to Atlantic to meet Amere's requirements on an *annual basis.* (Appendix B) It is not questioned that

Amere would require gas from Kentucky to meet its winter requirements.

The PSC order is clearly in conflict with the Natural Gas Act. "The power to fix rates for natural gas transported and sold in interstate commerce has been entrusted solely to the Federal Power Commission." *Public Utilities Commission of Ohio* v. *United Fuel Gas Company*, 317 U. S. 456, 468, 63 S. Ct. 369, 87 L. ed. 396 (1943). Congress meant to create a comprehensive dual system of regulation of the natural gas industry without any confusion of functions—federal and state regulatory bodies operating side by side, each active in its own sphere. *Public Utilities Commission of Ohio* et al. v. *United Fuel Gas Company, supra*, p. 467. If the PSC's order is not reversed, this intent of Congress will be thwarted completely and natural gas companies, under the Natural Gas Act, will be subjected to a hodge podge of conflicting state and federal regulations. cf. *Natural Gas Pipeline Corporation of America* v. *Corporation Commission of Oklahoma*, 349 U. S. 44, 75 S. Ct. 576, 99 L. ed. 866 (1955). Such result would necessarily impair service to consumers, whom the Natural Gas Act was intended to protect, *F.P.C.* v. *Hope Natural Gas Company*, 320 U. S. 591, 610, 64 S. Ct. 281, 88 L. ed. 333 (1947), and would discourage further investment in the natural gas industry.

Admittedly, the PSC's formula for fixing Amere's rates is based on assumed changes in Atlantic's operations which would increase Atlantic's cost of service to its other interstate customers. The Commission's witness admitted that Atlantic's unit cost of gas produced under United's FPC rates would be increased if Atlantic delivered *winter gas* to Amere in exchange for *summer gas* (T. 280), but said he gave no consideration to the effect of

such increased cost on Atlantic's other interstate customers. (T. 282) The PSC's order was not based on any study of the cost to Atlantic of performing the services which were assumed under the PSC's plan. (T. 279, 280, 282) The PSC has clearly attempted to regulate interstate commerce to the advantage of Amere's West Virginia consumers and at the expense of Atlantic's interstate customers outside of West Virginia. Such action conflicts with the national interest, which Congress sought to protect by prohibiting "undue preference or advantage" or "any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." (Natural Gas Act § 4(b)).

It is well settled that the interest of a state cannot be served at the expense of the national interest where interstate commerce is involved, and a state may not regulate interstate commerce so as to affect its flow or deprive it of needed uniformity in its regulation. *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 779-780, 782, 65 S. Ct. 1515, 89 L. ed. 1915, 1930, 1931-1932 (1945).

The supremacy of federal laws over state laws regulating interstate commerce invalidates the PSC's action in this case. This Court held in *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 62 S. Ct. 384, 86 L. ed. 371 (1942), that state regulation requireing a natural gas company to provide interstate service to a local customer was unlawful because the Natural Gas Act had given the FPC jurisdiction over such service. In *Natural Gas Pipe Line Company of America* v. *Corporation Commission of Okla., supra*, this Court held that an order of the Oklahoma Commission fixing the minimum field price of gas as a conservation measure, which

previously had been upheld under the Commerce Clause, was unlawful because it was in conflict with the Natural Gas Act. It follows that the PSC's action in the instant case is unlawful because it is based upon findings that four natural gas companies under the Natural Gas Act should change their operations and rates, and abandon service in violation of the Natural Gas Act.

While the utter destruction of Amere and the resulting deprivation of gas service to its more than 15,000 West Virginia customers, not counting its interstate wholesale business, is of great concern and entitled to the protection of Constitutional safeguards, such considerations, although substantial, may be transcended in importance by the unprecedented invasion of Federal jurisdiction by the PSC and the necessary effect thereof on future actions by both Federal and State Commissions.

It is therefore respectfully submitted that the federal questions are substantial and demand consideration by this Court.

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